



Trustee did not object to the debtors exemption election during the 30 days following the § 341 meeting of creditors.

5. On or about April 12, 1993, Langdon M. Cooper, attorney for the debtors in their prior Chapter 7 case, received a check from Carolina Mills in the sum of \$11,176.50 representing the male debtor's full vested share in the subject ERISA funds. Mr. Cooper represented the debtors in their attempt to recover this money and deducted therefrom his legal fee in the sum of \$1,100.00 and turned over to the debtors' present attorney the remaining ERISA funds of \$10,076.50.

6. The debtors wish to have the subject funds turned over to them as exempt property. However, the Trustee does not want to consent to same without a ruling by this court.

#### DISCUSSION

The court must decide whether the Trustee can challenge the debtors' exemption election of certain proceeds from a former ERISA qualified plan. The debtors claimed an exemption in the ERISA funds pursuant to § 522(1) of the Code. The Trustee did not object to the election within the 30-day period provided in Bankruptcy Rule 4003. Subsequent to the filing, and after the 30-day period, the debtors converted the ERISA qualified funds into cash and now rely on their exemption election to claim the funds exempt. The court has concluded that the funds became property of the estate pursuant to § 1306(a) upon their conversion. The debtors' exemption election at the time of filing was premature as the ERISA funds were not yet property of the estate. Consequently, the

Trustee was not required to object to the exemption pursuant to Bankruptcy Rule 4003(b). Nevertheless, even if the court concluded that the exemption was timely, under the circumstances of this case, the court would allow the Trustee's Motion for leave to object to the exemption.

A. ERISA Funds as Property of the Estate.

The Supreme Court has ruled that ERISA funds held by a debtor at the time of filing do not constitute property of the debtor's estate pursuant to § 541(c)(2) of the Code. Patterson v. Shumate, \_\_ U.S. \_\_\_, 112 S.Ct. 2242, 2250 (1992). At the time of filing the debtors were seeking to recover the ERISA qualified funds from the male debtor's employer. The funds were still in the ERISA plan. Thus, the funds were not property of the debtors' estate. The funds became property of the estate pursuant to § 1306(a) when the debtors retrieved the funds post-petition. It was at this point that the debtors should have attempted to claim the exemption.

B. Effect of Debtors' Exemption Election.

Section 522(b) of the Code permits the debtor to claim exemptions in property that would otherwise be considered property of the estate. 11 U.S.C. § 522(b). Property of the estate is defined in § 541. The Shumate case mandates that ERISA qualified funds are not considered property of the estate. Thus, there was no legal basis for the debtor to exempt the ERISA funds as they were never property of the estate.

The debtors argued that although there was no colorable basis to exempt the funds, they are nevertheless exempt because the Trustee failed to timely object to the exemption. The debtors relied on a recent Supreme Court decision to support their argument. In Taylor v. Freeland & Kronz, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1644 (1992) the debtor claimed exempt all proceeds from a pending employment discrimination suit and the trustee did not object within the time period proscribed by Bankruptcy Rule 4003(b). The parties agreed that the debtor had no statutory right to exempt the entire proceeds. Id. at 1646-48. The trustee argued that the 30-day period should not preclude judicial inquiry into an exemption claimed without "a good-faith or reasonably disputable basis for claiming it." Id. at 1648. The Court concluded that the 30-day period was a bar to the trustee's late objection whether the debtor had a colorable basis for claiming the exemption or not. Id.

The present case differs from Taylor in that the law suit in Taylor was property of the estate at the time of filing. The trustee in Taylor made a determination that the law suit was likely meritless, and declined to object to the exemption. Here, the ERISA funds were not property of the estate. Had the debtors initiated a law suit for the recovery of the funds, that law suit would have become property of the estate and the Trustee may have reacted differently to the debtors' exemption election. The court finds that the Trustee was not required to object to the exemption as the funds were not yet property of the estate. Only after the funds became property of the estate could the debtors attempt to

amend their claim of exemption to include some or all of the funds. This would provide the Trustee and other creditors an opportunity to object to that exemption. In addition, the court finds that the Trustee's failure to object to the claimed exemption does not bar the Trustee's present claim of interest in those funds.

C. Objection Pursuant to § 105.

Even if the court concluded that the debtors' original claim of exemption was proper, the circumstances of this case would not bar the Trustee's late objection to that exemption. Section 105 of the Code has been construed as granting courts the power to entertain objections to exemptions after the 30-day objection period. See, e.g., Ragsdale v. Genesco, Inc., 674 F.2d 277, 278 (4th Cir. 1982); In re Staniforth, 116 B.R. 127, 131 (W.D. Wis. 1990). In Ragsdale the Fourth Circuit held that the "allowance of a late [objection] is a matter vested in the discretion of the Bankruptcy Judge." Ragsdale, 674 F.2d at 278.

In the present case, there was no colorable legal basis for the debtors to exempt the funds that they recovered from the ERISA plan. The funds as they existed at the time of filing were still in the ERISA qualified plan. The Trustee, knowing that ERISA funds are not property of the estate, had no reason to object to the exemption election. Later, the debtors were successful in recovering the funds from the ERISA plan. It was not until this point that the debtors could properly exempt the funds. Under these circumstances the court concludes that it should grant the

Trustee leave to object to the exemption election pursuant to its powers under § 105 of the Code.

D. Use of the Funds.

Although the court has concluded that the funds are property of the estate and that the Trustee may object to any exemptions claimed in the funds, circumstances in this case warrant the debtors' use of the balance of the funds after exemptions. The only remaining claims in the base are non-dischargeable tax claims which will be paid by the debtors eventually. Thus, the use of the funds by the debtors will not affect the payment of the tax claim. In addition, it appears that the debtors have an urgent need for the use of the funds to purchase an automobile.

CONCLUSION

The court concludes that the debtors' original claim of exemption in the ERISA funds was premature. Funds held in an ERISA qualified plan are, by definition, not property of a debtor's estate. When a debtor receives property post-petition that constitutes property of the estate, the court may grant the debtor an opportunity to amend his exemption election to include some of all of the property. In this instance the debtors recovered funds post-petition that constitute property of the estate. The debtors have an opportunity to amend their exemptions to claim as much of the funds exempt as possible. In addition, the court concludes that to the extent the previous exemption election would be considered timely, the court should grant the Trustee leave to object to that exemption. Notwithstanding these findings the court

concludes that circumstances warrant the debtors' use of the balance of the funds after exemptions.

It is therefore ORDERED that:

1. The funds received post-petition from the ERISA qualified plan are property of the estate;
2. The debtors are entitled to claim exemptions, if any, in the funds;
3. The Trustee is hereby allowed to file an objection to the claim of exemptions both in the original schedules and any exemptions filed by the debtors as a result of this Order;
4. Circumstances in this case warrant the debtors use of the balance of the funds, after exemptions;
5. The debtors' attorney is hereby authorized to disburse the funds to the debtors; and,
6. This Memorandum of Decision summarizes the court's findings and conclusions in this matter and is the subject of a previous Judgment entered May 27, 1993.

This the 3<sup>rd</sup> day of August, 1993.

  
George R. Hodges  
United States Bankruptcy Judge